

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD DIAZ,)	
)	
Petitioner,)	No C 07-2612 VRW (PR)
)	
vs.)	ORDER TO SHOW CAUSE
)	
DERRAL ADAMS, Warden,)	(Docs # 2 & 3)
)	
Respondent.)	
_____)	

Petitioner, a state prisoner incarcerated at California State Prison, Corcoran, has filed a pro se petition for a writ of habeas corpus under 28 USC § 2254. Petitioner also seeks appointment of counsel and leave to proceed in forma pauperis under 28 USC § 1915.

BACKGROUND

Petitioner was convicted by a jury in the Superior Court of the State of California in and for the County of Monterey of second degree robbery and unlawful use of a badge. The court found true the allegation that petitioner had three prior strike convictions of robbery and one prior serious felony conviction of robbery. On April 10, 2003, he was sentenced to a total term of 15 years in state prison.

1 On April 21, 2005, the California Court of Appeal stayed a concurrent
2 one-year county jail sentence for unlawful use of a badge and affirmed the
3 judgment in all other respects. It also denied petitioner's request for habeas relief
4 based on a claim of ineffective assistance of counsel.

5 On June 29, 2005, the Supreme Court of California denied review and, on
6 February 20, 2007, the Supreme Court of the United States denied certiorari.

7 **DISCUSSION**

8 A. Standard of Review

9 This court may entertain a petition for a writ of habeas corpus "in behalf
10 of a person in custody pursuant to the judgment of a State court only on the
11 ground that he is in custody in violation of the Constitution or laws or treaties of
12 the United States." 28 USC § 2254(a).

13 It shall "award the writ or issue an order directing the respondent to show
14 cause why the writ should not be granted, unless it appears from the application
15 that the applicant or person detained is not entitled thereto." Id § 2243.

16 B. Legal Claims

17 Petitioner seeks federal habeas corpus relief by raising several claims,
18 including ineffective assistance of counsel, instructional error, improper
19 admission of character evidence, insufficient evidence and imposition of an
20 upper-term sentence without a jury trial. Liberally construed, the claims appear
21 cognizable under § 2254 and merit an answer from respondent. See Zichko v
22 Idaho, 247 F3d 1015, 1020 (9th Cir 2001) (federal courts must construe pro se
23 petitions for writs of habeas corpus liberally).

24 C. Motion for Appointment of Counsel

25 Petitioner's motion for appointment of counsel (doc # 3) is denied. See
26 Knaubert v Goldsmith, 791 F2d 722, 728 (9th Cir 1986) (unless an evidentiary
27

1 hearing is required, decision to appoint counsel in federal habeas proceedings is
2 within discretion of district court). Petitioner has clearly presented his claims for
3 relief in the petition and attachments thereto, and an order to show cause is
4 issuing. Accord Bashor v Risley, 730 F2d 1228, 1234 (9th Cir 1984) (although
5 petitioner had no background in law, denial of appointment of counsel within
6 discretion of district court where petitioner clearly presented issues in petition
7 and accompanying memorandum). The court will appoint counsel on its own
8 motion if an evidentiary hearing is later required. See Knaubert, 791 F2d at 728.

9 CONCLUSION

10 For the foregoing reasons and for good cause shown,

11 1. Petitioner's request to proceed in forma pauperis (doc #2) is
12 GRANTED.

13 2. The clerk shall serve by certified mail a copy of this order and the
14 petition, and all attachments thereto, on respondent and respondent's attorney, the
15 Attorney General of the State of California. The clerk also shall serve a copy of
16 this order on petitioner.

17 3. Respondent shall file with the court and serve on petitioner, within
18 60 days of the issuance of this order, an answer conforming in all respects to Rule
19 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
20 habeas corpus should not be granted. Respondent shall file with the answer and
21 serve on petitioner a copy of all portions of the state trial record that have been
22 transcribed previously and that are relevant to a determination of the issues
23 presented by the petition.

24 If petitioner wishes to respond to the answer, he shall do so by filing a
25 traverse with the court and serving it on respondent within 30 days of his receipt
26 of the answer.

1 4. Respondent may file a motion to dismiss on procedural grounds in
2 lieu of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the
3 Rules Governing Section 2254 Cases. If respondent files such a motion,
4 petitioner shall file with the court and serve on respondent an opposition or
5 statement of non-opposition within 30 days of receipt of the motion, and
6 respondent shall file with the court and serve on petitioner a reply within 15 days
7 of receipt of any opposition.

8 5. Petitioner is reminded that all communications with the court must
9 be served on respondent by mailing a true copy of the document to respondent's
10 counsel. Petitioner must also keep the court and all parties informed of any
11 change of address.

12 SO ORDERED.

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15 VAUGHN R WALKER
16 United States District Chief Judge
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